

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CHRISTINE DEE MITCHELL, and  
THOMAS J. MITCHELL

Plaintiffs,

v.

CHRIS BISCHOFF, et al.,

Defendants.

CASE NO. C14-5129 BHS

ORDER GRANTING IN PART  
AND DENYING IN PART AS  
MOOT DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendants Chris Bischoff, Michael Karnofski, and Jennifer Vines's ("Defendants") motion for summary judgment (Dkt. 33). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants in part and denies in part as moot Defendants' motion for the reasons stated herein.

**I. PROCEDURAL HISTORY**

On February 13, 2014, Plaintiffs Christine and Thomas Mitchell ("the Mitchells") filed a complaint against Defendants alleging that their civil rights have been violated because their property rights have been unreasonably restricted. Dkt. 1.

1 On February 5, 2015, Defendants filed a motion for summary judgment. Dkt. 33.  
2 On February 10, 2015, the Mitchells responded. Dkt. 36. On March 3, 2015, Defendants  
3 replied. Dkt. 37.

## 4 **II. FACTUAL BACKGROUND**

5 This is a case about the septic drainfield on Mrs. Mitchell's current property at 645  
6 Ostrander Road in Kelso, Washington. The property is under the jurisdiction of Cowlitz  
7 County. The Mitchells sued Defendants because they were enforcing the Cowlitz County  
8 codes and ordinances when they denied the Mitchells' permit application to add a  
9 residence onto the existing septic system. The permit application was denied because the  
10 septic drainfield did not comply with Washington State and Cowlitz County health codes  
11 and ordinances.

12 In 1979, Robert Brown was the owner of the Ostrander Road property. Mr.  
13 Brown submitted plans to upgrade his home, adding (among other things) a bedroom.  
14 Mr. Brown's plans also included a replacement septic system, consisting of a steel 1,000-  
15 gallon tank and a 720-square-foot drainfield. The plans were approved on September 6,  
16 1979. The installed drainfield was inspected and approved on October 17, 1980.

17 Thirty years later, in March 2010, Robert Brown needed to replace the steel septic  
18 tank with a 1,200-gallon concrete tank. Jim Chenier, the tank installer, and Mr. Brown  
19 submitted a permit application to Cowlitz County on March 1, 2010. The plans were  
20 filed on March 4, 2010. The County issued a permit and the new septic tank was  
21 installed and approved by March 8, 2010. Mr. Chenier did not inspect the drainfield at  
22 the time, nor was he required to do so.

1 According to the Mitchells' complaint, Mrs. Mitchell purchased the Ostrander  
2 property in April 2012. There is no evidence showing that she required a septic system  
3 inspection before purchasing the property. Later in 2012, Mrs. Mitchell's mother became  
4 infirm and could not live independently. Mrs. Mitchell decided to purchase a mobile  
5 home and install it on her property. At the time Mrs. Mitchell purchased the Ostrander  
6 Road property, the septic system was permitted for a single, four-bedroom house. In  
7 order to connect the mobile home to the existing septic system, the Mitchells intended to  
8 seek a waiver from the County.

9 On August 27, 2013, Mrs. Mitchell sent correspondence to Cowlitz County  
10 requesting a temporary dwelling permit for the mobile home. As part of the permitting  
11 process, Mrs. Mitchell was required to have a professional engineer inspect the septic  
12 system and certify that the septic system had not failed and that it complied with certain  
13 health codes and regulations.

14 The Mitchells hired Brian Hewitt, P.E., to perform the inspection for compliance.  
15 The 1979 permit approved a restrictive mottling layer at 46 inches, with a maximum  
16 drain field depth of 32 inches, allowing for 14 inches of separation between the septic  
17 drain field and the groundwater level. Mr. Hewitt, however, dug six holes in 2013 that  
18 revealed mottling at depths of 18 to 31 inches. In one place, only 4 inches of separation  
19 between the drainfield and the groundwater level was recorded. The current code  
20 requires 24 inches of separation between the drainfield depth and the groundwater level  
21 in order to allow proper filtration between the septic drainfield and groundwater level.  
22 Mr. Hewitt reported that the septic system was not up to code, but then recommended

1 approval of the system because fewer residents than the average for a four-bedroom  
2 house lived at the property, and because Cowlitz County had different, more stringent,  
3 standards than other counties regarding septic systems. Because the items Mr. Hewitt  
4 relied on to “approve” the system were not congruent with Cowlitz County’s regulations  
5 for septic systems, the septic permit/waiver was denied.

6 On October 16, 2013, while this dispute was pending, Mr. Mitchell applied for a  
7 permit to build a large garage/storage unit on the property. He received a building permit  
8 and built the structure. In mid-November 2013, Mr. Mitchell met with Chris Bischoff,  
9 the Environmental Health Manager of Cowlitz County, and Mr. Hewitt. Mr. Mitchell  
10 was informed at that time that he could not obtain the septic reconnection permit because  
11 the drain field had failed and must be replaced. Mr. Mitchell was also informed that the  
12 County could not issue a permit for the construction/installation of the mobile home  
13 because the septic drainfield had failed. Mr. Mitchell was informed that the only options  
14 were to either (1) not pursue the building permit, or (2) replace the septic drainfield.

15 On December 10, 2013, Mr. Mitchell appeared before the Cowlitz County Board  
16 of County Commissioners at its regular meeting. He demanded that the County pay for a  
17 new septic drainfield on the Ostrander property. He also stated that he had filed a Notice  
18 of Claim with the County. Because a Notice of Claim had been filed, the Board of  
19 Commissioners declined to comment on Mr. Mitchell’s demands.

20 In January 2014, Jennifer Vines, MD, MPH, became the new County Health  
21 Officer. Mr. Mitchell contacted Dr. Vines to try and get her to write a letter supporting  
22 the request for waiver regarding the septic system. Dr. Vines spent a significant amount

1 of time investigating and considering the Mitchells' situation, at times consulting Mr.  
2 Bischoff. Dr. Vines eventually sent a letter to Mr. Mitchell reiterating that the septic  
3 system was out of compliance and the permit could not be issued. She laid out, in detail,  
4 all the options Mrs. Mitchell could implement to bring the septic system in compliance  
5 with the County codes/ordinances. She also informed the Mitchells that continuing to use  
6 the failed septic system could expose them to daily fines.

### 7 **III. DISCUSSION**

#### 8 **A. Summary Judgment Standard**

9 Summary judgment is proper only if the pleadings, the discovery and disclosure  
10 materials on file, and any affidavits show that there is no genuine issue as to any material  
11 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).  
12 The moving party is entitled to judgment as a matter of law when the nonmoving party  
13 fails to make a sufficient showing on an essential element of a claim in the case on which  
14 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,  
15 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,  
16 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*  
17 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must  
18 present specific, significant probative evidence, not simply "some metaphysical doubt").  
19 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists  
20 if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or  
21 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477  
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1 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d  
 2 626, 630 (9th Cir. 1987).

3 The determination of the existence of a material fact is often a close question. The  
 4 Court must consider the substantive evidentiary burden that the nonmoving party must  
 5 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477  
 6 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual  
 7 issues of controversy in favor of the nonmoving party only when the facts specifically  
 8 attested by that party contradict facts specifically attested by the moving party. The  
 9 nonmoving party may not merely state that it will discredit the moving party’s evidence  
 10 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*  
 11 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,  
 12 nonspecific statements in affidavits are not sufficient, and missing facts will not be  
 13 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

#### 14 **B. Defendants’ Motion**

15 There are numerous issues in this case that are irrelevant and need not be  
 16 addressed by the Court because the Mitchells fail to state any basis for this Court’s  
 17 jurisdiction. “If the court determines at any time that it lacks subject-matter jurisdiction,  
 18 the court must dismiss the lawsuit.” Fed. R. Civ. P. 12(h)(3).

19 In this case, it appears that the Mitchells’ only basis for jurisdiction is a  
 20 constitutional “right to take care of your own.” Dkt. 33 at 15. Defendants challenged  
 21 this asserted basis for and existence of this right in their motion. *Id.* at 15–16. The  
 22 Mitchells failed to respond to this argument or identify any other federal right that would

1 confer jurisdiction on this Court. The Court agrees with Defendants that there is no  
2 independent “right to take care of one’s own.” Without any actual or even alleged  
3 violation of a federal right, the Court must dismiss the claims in this lawsuit for lack of  
4 jurisdiction. Therefore, the Court grants Defendants’ motion on this issue.

5 **IV. ORDER**

6 Therefore, it is hereby **ORDERED** that Defendants’ motion for summary  
7 judgment (Dkt. 33) is **GRANTED in part** and **DENIED in part as moot** because this  
8 Court lacks jurisdiction. The Mitchells’ claims are dismissed and the Clerk shall close  
9 this case.

10 Dated this 27th day of March, 2015.

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13 BENJAMIN H. SETTLE  
14 United States District Judge  
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